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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TONY SHAVERS, Defendant and Appellant.	A125310 (Marin County Super. Ct. No. SC159746)

Tony Shavers appeals from a judgment entered after he pled of guilty to the offense of robbery. His court-appointed counsel has filed a brief raising no legal issues and requesting our independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436.

FACTS AND PROCEEDINGS BELOW

On June 26, 2008, the Marin County District Attorney filed a one-count complaint charging appellant with robbery (Pen. Code, § 211).[1] The complaint also alleged two firearm enhancements (§§ 12022.5, subd. (a); 12022.53, subd. (b)), and that due to his use of a firearm appellant was ineligible for probation (§ 1203.06, subd. (a)(1)(b)).

The "arrest summary" set forth in the presentence report states as follows: "On March 27, 2008, at approximately 8:01 p.m., San Rafael Police Department was dispatched to Toys R Us store on Francisco Blvd. on a report of robbery. The victim/clerk, Christina Elkin reported that the defendant approached her register to

[1] All statutory references are to the Penal Code.

purchase candy. When the clerk opened the register the defendant pulled out a semiautomatic pistol and placed it on the counter pointing it at her. He demanded money from the register. The victim did not respond so the defendant reached across the counter to the open register and grabbed $807.66 and fled the store on foot. A warrant was issued for the defendant. The defendant turned himself in to [the] Fulton County Sheriffs Office, Atlanta, Georgia on 7/16/08 and was booked into [the] Marin County Jail on 7/24/08."

The preliminary hearing commenced on October 23, 2008. Shortly after the testimony of the police officer who investigated the robbery, and while the next prosecution witness was about to take the stand, the district attorney and public defender approached the bench and engaged in an off-the-record discussion with the court, after which the court ordered a 10-minute recess. When the hearing resumed, the court announced that it had been handed change of plea forms and the parties had "reached a resolution of the case."

In return for pleading guilty to the charged robbery and admitting the firearm allegation within the meaning of section 12022.5, subdivision (a), appellant was promised a six-year prison term. Appellant also waived his right to withdraw his plea if he failed to appear on or before imposition of the judgment. (*People v. Cruz* (1988) 44 Cal.3d 1247; *People v. Vargas* (1990) 223 Cal.App.3d 1107.)

More than three months later, on February 5, 2009, appellant moved to withdraw his plea. (§ 1018.) After the court found that appellant's claim of ineffective assistance of counsel was colorable, it did not relieve the public defender, but appointed private defense counsel to handle the motion. Two months after that, on April 13, appellant decided not to pursue the motion. On April 22, the court reappointed private counsel for all purposes, and relieved the public defender. One week later, on April 29, appellant again changed his mind, deciding to pursue the motion.

The motion to withdraw the plea was filed on May 11, 2009. The "fundamental reason" for the motion was that appellant "erroneously believed that a conviction for a PC 211 violation resulted in a mandatory prison sentence." In other words, appellant

claimed that had he not admitted the section 12022.5, subdivision (a) allegation, he would have been eligible for probation despite his plea of guilty to the robbery. Appellant claimed he had not been given this information by the public defender, and that if he had he would not have made the admission. Appellant claimed the public defender's failure to provide this information constituted ineffective assistance of counsel. The assistance provided by the public defender was allegedly also ineffective due to his failure "to explore a mental illness defense." Appellant claimed in his motion that he "did not understand the plea form, did not understand the impact of the allegations in the complaint, did not understand the meaning of an appeal and did not know he was waiving that right."

The hearing on the motion to withdraw the plea was held on June 11, 2009. Deputy Public Defender Brian Morris, who represented appellant at the time he entered his plea, was the sole prosecution witness and appellant was the only witness who testified for the defense.[2] At the close of the hearing, the court denied the motion to withdraw the plea.

On June 17, 2009, the court sentenced appellant to the indicated sentence of six years in state prison based on the middle term of three years plus three years for the firearm enhancement. (§§ 213, subd. (a)(2); 12022.5, subd. (a).) Appellant was awarded a total of 386 days of presentence custody credit. (§§ 2900.5, 2933.1.) The court also imposed a restitution fine in the amount of $1,200, and suspended imposition of a parole revocation fine in the same amount. (§§ 1202.4, subd. (b); 1202.45.) Finally, the court imposed a security fee in the amount of $20. (§ 1465.8, subd. (a)(1).)

Appellant filed a timely notice of appeal on June 17, 2009, and his request for a certificate of probable cause was granted that same day.

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[2] With respect to the testimony of the deputy public defender, new defense counsel agreed that appellant waived the attorney-client privilege with respect to the facts placed at issue by his motion and claim of ineffective assistance. The district attorney agreed that if appellant's motion was granted and the matter went to trial, appellant's testimony at the hearing on his motion to withdraw his plea could not be used by the prosecution at that trial.

DISCUSSION

A defendant may move to withdraw a previously entered guilty plea at any time before judgment for "good cause." (§ 1018.) Good cause consists of "[m]istake, ignorance or any other factor overcoming the exercise of free judgment. . . . But good cause must be shown by clear and convincing evidence." (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) " ' "The grant or denial of an application to withdraw a plea is within the discretion of the trial court after consideration of all of the factors necessary to bring about a just result." ' " (*People v. Harvey* (1984) 151 Cal.App.3d 660, 666-667.) The trial court's decision will be upheld unless there is a clear showing of abuse of discretion. (*Ibid*.) A defendant cannot withdraw a plea simply because of his or what he perceives as his attorney's poor tactical assessments or decisions. (*McMann v. Richardson* (1970) 397 U.S. 759; *Mendieta v. Municipal Court* (1980) 109 Cal.App.3d 290, 294.)

Appellant was the first witness at the hearing on the motion to withdraw the plea. Under cross-examination, he explained that he initiated the interruption of the preliminary hearing by asking Deputy Public Defender Morris, " '[c]an you get me six years,' " and Morris told him "that the DA's office was agreeable to six years." While awaiting sentencing after he "signed the deal," appellant read something in a book available in the jail about the availability of a "line-up motion," and suggested this to Morris. Morris agreed such a motion could be filed, but felt this was not really in appellant's interest. This "made no sense" to appellant, and he repeatedly wrote and called Morris conveying his desire for a line-up. Appellant explained to Morris the "rules of the game" that he had learned "on the street": "Somebody say you did something to them, you ask for a line up."

Appellant acknowledged that Morris explained the robbery charge, that it would count as a "strike" under the three-strikes law, that he was also charged with

personally using a firearm, and that as a consequence of these charges he was exposed to 15 years in prison. When asked whether Morris had explained to him "that if you are convicted of the robbery and you also admit the gun, that you can't get probation?" appellant answered, "No. He didn't explain that to me." According to appellant, he was led by Morris to believe that "the 211 is what stopped me from getting probation." Appellant acknowledged that the prosecution never indicated any willingness it would accept only a plea of guilty to the robbery charge; every offer included his additional admission to the gun allegation. At first the prosecution was willing to offer seven years, but Morris persuaded the district attorney to reduce the time to six years.

Appellant testified that he told Morris he was addicted to heroin and "had a sexual abuse history" and had "gone through some awful things as a child," but Morris did not use this information. Appellant acknowledged that the signature on the written plea agreement was his, but stated that he "felt pressured into signing [the document]." When asked by the district attorney whether, when he signed the agreement, "you never thought to yourself, 'I don't want to do this right now,' " appellant responded, "Yeah. I didn't want to take no six years." After reminding appellant of his testimony that he initiated the plea negotiation by asking Morris to learn whether the prosecution would agree to six years, the district attorney asked: "Why did you take the six years if you didn't want the six years?" Appellant answered: "Mr. Morris couldn't give me a line-up. I couldn't go to trial with him. It was that easy for me. I can't get him to give me a line-up, how can I ever come to trial?"

Appellant also stated that he "felt rushed" to take the plea; "I felt like it wasn't enough time. Mr. Brian [Morris] know my education thing." When asked whether he was being truthful when, at the time of entering the plea, he told the court that he understood everything in the plea form, appellant answered:

"I wasn't being truthful." When asked whether he thought his attorney "was in league with the People, with the prosecution, to try to fast-track you to prison?" appellant responded, "I think he swapped me for somebody. [¶] . . . [¶] Some inmates say, 'Give me one now, I'll give you one later,' the DA and the public defender. He did nothing. Mr. Morris did nothing."

On redirect, appellant testified that "I don't think I can read." When going over the plea form and other documents he had signed with his present counsel, she had to explain them "[w]ord for word." It took appellant 30 to 40 minutes to read and understand a single page of his written declaration. According to appellant, Morris did not make him understand the meaning of the documents he signed. The only reason he signed the agreement was that he was "[f]orced, basically . . . to do this." Appellant also felt "[f]orced" to tell the court that he understood the meaning and consequences of the forms he signed.

Brian Morris testified that he has been a Marin County deputy public defender for eight or nine years and supervises other attorneys handling felony offenses. He has never previously been claimed to have provided a defendant ineffective assistance, and no court has ever found that he did. He went over the charges and allegations in the complaint with appellant "probably six or seven times." At no time during his discussions with appellant did he ever tell him that a conviction of a section 211 offense by itself would render him ineligible for probation. When read a paragraph in appellant's declaration stating, "I was told by my attorney, Mr. Morris, that a conviction of Penal Code section 211 resulted in a mandatory prison sentence," Morris denied making such a statement. He also stated that he never heard appellant express the belief that a conviction of robbery would make him ineligible for probation. Morris discussed with appellant "the nature of a 211 conviction as a strike offense," the fact that it would be "a serious felony" and also a "violent felony," and the possible future consequences of a

strike offense. He explained the ranges of the penalties that could be imposed under sections 12022.53, subdivision (b), and 12022.5, subdivision (a)(1), and told appellant "that if there was a gun involved, that he wouldn't be able to get probation." When asked whether he advised appellant "that by pleading guilty to a 211 and admitting a gun use allegation . . . that he would be ineligible for probation?" Morris answered, "[y]es," and denied the truth of an allegation in appellant's declaration that he did not receive such advice. Morris also explained to appellant that if he pled guilty in accordance with the district attorney's offer, that plea could be used to show that he had a gun in other cases that might be brought against him in the future. Morris denied the statement in appellant's declaration that he had instructed appellant not to talk to the probation department, and stated that he never attempted to shield from appellant the fact that he could potentially get probation.

Morris acknowledged that appellant raised the issue of a line-up and that "[w]e talked about it quite a bit back and forth." Morris told appellant that identification was not an issue in the case, and explained that he had not sought a line-up because "it would be just as easy for me to impeach [Christina Elkin, the Toys R Us clerk] using the video itself and her statements to the police." However, appellant's request for a line-up "didn't seem like an awful idea . . . at that point, so I said I would do it." Morris filed a request for a line-up prior to the preliminary hearing, though the need for it was eliminated by the negotiated plea.

Morris also denied appellant's claim that he " 'never explored treatment options for me.' " Morris described his apparent effort to have appellant admitted to the drug treatment program in the Marin County jail, but felt appellant's desire to receive treatment at the Delancey Street program while on probation was unrealistic: "I definitely told him on a number of occasions that I thought based on my experience with criminal cases, that considering he was facing the robbery

charge here with an allegation of a gun, and was facing nine other—at least nine other incidents of robbery with a gun that occurred out of the county, that his chances of getting probation on all of those cases was slim to none."

Morris knew appellant was disappointed that no eyewitness appeared at the preliminary hearing, but explained why such witnesses were unnecessary at that stage of the proceeding, and also pointed out that the prosecution had fingerprint evidence of appellant's presence at the scene of the charged offense. Morris was aware appellant had very poor reading skills, and for that reason he went over the plea form with him "word for word." With respect to appellant's claim that he told Morris he did not have a gun, Morris explained that appellant told him that he did not possess a "real gun," but used a "fake."

After the close of testimony and arguments of counsel, the court denied appellant's motion to withdraw his plea. The court found Morris's testimony "credible in its entirety" and that appellant "in all likelihood, misrecollects some things about his prior conduct or conversations with Mr. Morris." Determining that "[t]here is no evidence that any of Mr. Morris's work fell below the standard of care expected of a competent attorney [and that] he upheld the normal high standard that he carries in this courtroom," the court found "no ineffective assistance of counsel whatsoever."

With respect to the "primary claim" that appellant "misunderstood that he may have been eligible for a grant of probation if he were convicted of just the 211," the court found, first, that "there was no wrongdoing by anybody to give him that impression," second, that the claim conflicted with Morris's credible testimony and, finally, that any misunderstanding on appellant's part cannot reasonably be attributed to any failure of counsel.

There was no error. Appellant failed to show by clear and convincing evidence the mistake, ignorance or inadvertence that may provide good cause to

withdraw a previously entered guilty plea. For that reason, and also because the trial court amply considered all of the relevant factors, it is not reasonably arguable that denial of appellant's motion to withdraw his plea was an abuse of discretion.

The record provides no other arguable basis upon which to question the validity of appellant's plea or the denial of his motion to withdraw it.

The sentence imposed is authorized by law.

Our independent review having revealed no arguable issues that require further briefing, the judgment entered upon denial of appellant's motion to withdraw his plea is affirmed.

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Kline, P.J.

We concur:

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Haerle, J.

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Lambden, J.